#273

Human Rights Code, 1981

IN THE MATTER OF the Complaint made by Mr. Dolph Boehm, of Hamilton, Ontario, alleging discrimination in employment because of handicap by National System of Baking, Limited, its servants and agents, and Mr. Bruce Heagle (General Manager), Mr. Harold Pettifer (Assistant Manager) and Mr. David Woods (Foreman), all of Hamilton, Ontario, in contravention of section 4 of the Human Rights Code, S.O. 1981, c. 53.

BEFORE: Peter A. Cumming, Q.C., Board of Inquiry

APPEARANCES: Mr. Michael M. Fleishman, counsel for the Ontario Human Rights Commission and the Complainant.

Mr. James D. Higginson, counsel for the Respondents.

1. Introduction

This inquiry is unique, in that it is the only known case in any jurisdiction in which the issue is alleged harassment in employment because of handicap or disability. As well, there is a good deal of conflicting evidence, with divergent views of witnesses as to the facts that are not easily reconciled. Thus, there is the need for some detail to be given in respect of the evidence.

The Complainant, Dolph Boehm, age 27, is an exceptional young man in several respects. First, as he and his family physician testified, he has a mental disability that clearly falls within the definition "because of handicap" set forth in paragraph 9(b) of the Human Rights Code, 1981, S.O. 1981, c.53 (hereafter, the "Code"), which reads:

> ""because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
>
> (ii) a condition of mental retardation or impairment,
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> (iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, or
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> (iv) a mental disorder;"

Dr. George Osbaldeston, the Boehm family physician since 1954, and who had delivered Dolph at birth, testified that it had taken Dolph almost five years at school to complete Grade 1. It is enough to state that Mr. Boehm has "a condition of metal...impairment". In common vernacular, he is a 'slow learner', although it seems the reason for this is very

uncertain. Unfortunately, so little is known about learning disabilities that it may be that Dolph Boehm has a learning disability that impedes the utilization of his normal intelligence. (Evidence, vol. 1, pp. 165-167). It is enough to say that, quite clearly, the Complainant has a "handicap" (or disability) within the meaning of subparagraphs 9(b) (ii), (ii) or (iv) of the Code. While this condition makes him exceptional, the much more exceptional feature of Dolph Boehm is what he has made of himself. He has obviously worked hard to gain knowledge, communication skills, and work skills. If the measure of a person is to make the best of one's abilities (and I think it is), Dolph Boehm is truly an outstanding young man, and of very significant credit to himself, his family, and society. In terms of accomplishment he would put many a Phd. graduate to shame. He is successful in leading a life that is productive and happy. He is an articulate young man, considerate of others, and is making a real contribution to society. Mr. Boehm graduated from vocational school in 1978, and was married in June, 1986.

It should be noted that it is obvious from the evidence of Dolph Boehm, his brother Michael and his mother Margaret Boehm, that there is a great deal of love, sharing and trust in the Boehm family. Collectively they have accepted and faced the reality of Dolph's disability with love, responsibility, courage and good sense.

The Code provides, in section 4:

"(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of ... handicap."

As well, the Code defines "harassment" in paragraph 9(f),

> ""harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome;".

In August, 1980, Dolph Boehm commenced his first full-time job, with the Respondent, National System of Baking, Limited (hereafter "National") at one of its bakery/retail stores located in Hamilton. National has 15 stores in all and hires many handicapped people.

He had graduated from a program, "Amity", run by "Vocational Rehabilitation Services" of the Minister of Community and Social Services of the Provincial Government. (Evidence, vol. 1, p. 6). The Complainant is an obvious example of the need for, and merit of, this type of government program.

Mr. Boehm had learned various vocational skills which concluded with a job placement (under a government/employer cost-sharing arrangement) at National in August, 1980. After a six month probation, he gained regular employment status with National, in February, 1981 (see Exhibit #3). Dolph's brother, Michael, testified as to the importance of Dolph's achievement in gaining employment with National for his self-esteem, saying it

was as if it was "the debut after years of practicing and rehearsals".

By the accounts of all the witnesses, Mr. Boehm was a very good employee. Fellow workers, June Jones, Helen Restauri, Dennis Easton, Brent Meidus, Allergina Bozzo and Ronald Wilkinson, and the individual Respondents, David Woods, Bruce Heagle, and Harold Pettifer, all stated that Mr. Boehm was an eager, willing and good worker. Indeed, no witness suggested anything to the contrary. Hence, it is particularly tragic that events then unfolded as they have.

Problems developed that concluded with the Complainant leaving his employment February 21, 1984, and not returning. Mr. Boehm alleges a breach of both subsections 4(1) and 4(2) of the Code by Respondents. More particularly, he alleges breaches by the individual Respondent, David Woods, the production manager and his supervisor at National. It is clear that Mr. Boehm had no problems in his work at National for the more than a year that he worked there prior to the arrival of Mr. Woods. Mr. Boehm also asserts that National, the corporate Respondent, is responsible at law for the breaches of Mr. Woods, if he is found to have been in breach of the Code. Dolph Broehm's Complaint, dated March 22, 1984, was filed as Exhibit #2.

Mr. Boehm was earning $170.00 a week at National when he left, and was then unemployed for about four months, receiving unemployment insurance in the total amount of $2,274.00 (Exhibits #6 and #7). He then found work with another bakery, Verwaal's

Bakery, at $4.00 an hour, 25 cents an hour less than he had been earning at National before he left.

Mr. Boehm worked at Verwaal's for a year, and has since moved of his own volition to another job at W.H. Voortman Cookies Limited. (Evidence, vol. 1, p. 50.)

2. The Evidence

When Dolph Boehm started work at National in August, 1980, (Exhibit #8) Dennis Easton was his principle supervisor in practice if not in title (it seems Mr. Easton was acting "production manager". (Evidence, vol. 2, p. 367). At least, this was the case after another employee, Kevin Legue, left. (Evidence, vol. 1, p. 471.) Although there was some uncertainty (from the evidence of Mr. Boehm and Mr. Easton) as to the precise period in which Mr. Easton served as Mr. Boehm's supervisor, it is clear they got along well. At first, Mr. Boehm was a pan-washer, but later he took on some of the 'mixer' tasks. More generally, he was a handyman about the bakery, doing cleaning, the unloading of trucks regularly, and snow removal in the winter. Mr. Boehm received raises in October, 1980 and October, 1981.

Mr. Easton testified that Mr. Boehm was eager to learn and gain more responsible tasks. Mr. Easton described Mr. Boehm as a "very good worker" (Evidence, vol. 1, p. 178) who was "more or less, an all around helper", (Evidence, vol. 1, p. 182) "cheerful" and "well- liked". (Evidence, vol. 1, p. 132.) Mr.

Easton said that Mr. Boehm had some problems with the responsibility of mixing, given the demands of exactitude in respect of quantities and the sequence of ingredients. However, generally Mr. Boehm did not make the same mistake twice and as Mr. Easton was careful to have Mr. Boehm do one thing at a time under supervision, there were no real problems. Mr. Easton had some 16 to 20 years experience in a number of bakeries, including 4 or 5 with National. Ms. Helen Restauri, the senior mixer who had taught and supervised Dolph in respect of mixing, testified that he was "a little slower but ...[otherwise] he was just like an ordinary person". (Evidence, vol. 1, p. 211.)

On November 3, 1981, David Woods became production manager and Mr. Easton left a week or so later. Mr. Woods, age 39, had been a cook and baker with the Canadian Navy for ten years and then had worked with Dominion Stores and Canada Safeway as a baker before coming to National. Mr. Woods worked at National from November, 1981, until October, 1986, but left National of his own volition.

As production manager, Mr. Woods had 8 to 22 employees (depending upon how busy the bakery was) working under him and had the authority to discipline or discharge employees.

Mr. Woods was regarded by his superiors as very competent. Mr. Bruce Heagle, vice-president and chief operating manager for National, testified that he thought Mr. Woods was at times "a little bit too easy" with the employees. (Evidence, vol. 2, p. 471.)

The crux of Mr. Boehm's Complaint is the allegation that Mr. Woods discriminated against him unlawfully by harassment in the workplace because of his handicap. The allegation is that Mr. Woods picked upon Mr. Boehm because of his disability, harassed him, and ultimately rendered it unreasonable for Mr. Boehm to have to continue to work under such employment conditions, in effect resulting in the constructive dismissal of Mr. Boehm.

Mr. Boehm testified that Mr. Woods would purposely confuse him in assigning work tasks. (Evidence, vol. 1, pp. 107, 108; 114.) Mr. Boehm said that Mr. Woods would often yell at him, would respond generally to questions or protests by saying "no excuses, no excuses", and often tell Mr. Boehm he needed "a kick in the ass". (Evidence, vol. 1, pp. 17-18; 108-109.)

Dolph Boehm tends to smile when receiving instructions and, as a nervous reaction, when under strain or pressure in front of others. (Evidence, vol. 1, p. 205.) This was also apparent when he was giving testimony during this hearing. It should be apparent to anyone who works with him.

Mr. Woods testified that Dolph never appeared to him to be upset, and said he smiled "all the time". (Evidence, vol. 2, p. 312.)

Mr. Boehm is struggling hard to be independent, self-sufficient and respected for his rights as a responsible adult. He is very sensitive, even to harmless questioning, about being treated as a mature adult. (Evidence, vol. 1, pp. 131, 132.) He would even interpret Mr. Woods' congratulatory comments at the

time of giving him a pay cheque as implying that Mr. Woods was evidencing surprise at Mr. Boehm managing to do the job. (Evidence, vol. 1, p. 135.)

Mr. Boehm also felt he was being given too many tasks for any one worker, and there was some support for this opinion from other workers. Mr. Boehm testified that Mr. Woods would often threaten him with "if [you] can't handle it, [I'll] get someone else that can". (Evidence, vol. 1, p. 15.)

Mr. Boehm was very upset and unhappy working under Mr. Woods, and had his mother prepare a typed letter on his behalf, dated September 3, 1982, (dictated by Mr. Boehm), Exhibit #5, which Mr. Boehm gave to Mr. Woods. The Complainant's mother testified that her son's problems at National began only when Mr. Woods became his supervisor. She testified that her son complained that Mr. Woods "was giving him a heavy workload, centering him out in front of people and giving him conflicting duties." (Evidence, vol. 1, p. 303.) Mr. Boehm testified that Mr. Woods refused to discuss the complaining letter with him, threw it to the floor and stomped on it, and said only that "I better keep that for my files". (Evidence, vol. 1, p. 18.) Mr. Woods, in his later testimony denied this, saying that he was dumfounded by the letter. (Evidence, vol. 2, pp. 372-275.)

Mr. Woods testified that National hired another part-time pan-washer after receiving Dolph's letter to lighten up the workload on Dolph. (Evidence, vol. 2, p. 416.)

In October 1983, an incident occurred involving the return of a pie by a customer, the apple pie filling lacking sugar.

Mr. Boehm testified that when the pie was returned, Mr. Woods called him a "retard" and a "dummy" and he made comments like "where's your brain, in your feet?". Mr. Boehm testified that Mr. Woods demanded that he eat the pie because it is the "only way people like these" will understand. (Evidence, vol. 1, pp. 21, 25; 110.) Mr. Boehm claimed that Mr. Woods told him he would have to eat the whole pie by three o'clock that day to keep his job. (Evidence, vol. 1, pp. 88, 89.) Mr. Woods later testified that he only asked Dolph "to taste" the pie to teach him what its like without sugar. However, Brent Meidus, a fellow worker at National, testified that he heard Mr. Woods instruct Dolph to each the whole pie. (Evidence, vol. 1, p. 230.)

Mrs. Restauri, the head mixer, testified that she saw Mr. Boehm sitting at the front desk with a fork and pie at the time of the so-called pie incident although she did not see anything else.

Ms. June Evelyn Jones, an employee of National's at the time, recalled this incident, saying that when Mr. Boehm told her he had to eat the pie she told him he did not have to, and said Mr. Woods criticized her for interfering when he was trying to teach Mr. Boehm "a lesson". (Evidence, vol. 1, pp. 191, 192.)

Mr. Boehm testified,

> "...I said I didn't mind tasting it. It was the name calling that hurt me the most. You don't call people retards if they are handicapped. (Evidence, vol. 1, p. 90.)

Mr. Woods denied there was any "force feeding" of the sugarless apple pie and claimed he was "shocked" when Dolph's mother and father complained to Mr. Heagle about the pie-eating incident. (Evidence, vol. 2, pp. 394, 434, 435.) He admitted only that he perhaps should not have asked Dolph to sit down to eat the pie, as his action might have been misunderstood. (Evidence, vol. 2, pp. 437, 438).

The explicit name-calling accusation centered largely upon this particular incident, but Mr. Boehm understood Mr. Wood's often-stated remarks such as "if you can't handle it, I'll get someone who can", to be said in a manner that suggested he could not manage because he was handicapped. (Evidence, vol. 1, p. 93.)

Dolph's mother, Mrs. Boehm, went to Mr. Bruce Heagle, General Manager for National, about the pie incident, who spoke to Mr. Woods about the matter. Mr. Boehm said Mr. Woods responded by telling Mr. Boehm he was a "cry baby" and saying "Can't you handle your own battles?" but did leave him alone for a month or so.

Ms. Jones testified as to another incident when Mr. Boehm had cleaned a fridge with an SOS pad, and Mr. Woods, being dissatisfied with Mr. Boehm's work, called Mr. Boehm "a retard". (Evidence, vol. 1, pp. 194, 195.)

Ms. Jones testified that on another occasion Mr. Woods was dissatisfied with the work of a mentally handicapped female employee who was preparing dough, stating that the woman was

"retarded" in front of the employee and Ms. Jones. (Evidence, vol. 1, p. 201.) Although Mr. Boehm was not present in respect of that incident, the testimony of Ms. Jones tends to corroborate Mr. Boehm's evidence of the type of language and manner in which Mr. Woods dealt with Mr. Boehm.

Ms. Jones testified that on another occasion Mr. Woods stated to Ms. Jones (in the absence of both Mr. Boehm and the female worker with the mental disability) that if the two employees with disabilities "got together, imagine what kind of kids they would produce". (Evidence, vol. 1, p. 202.) Mr. Woods denied making any such statement. (Evidence, vol. 2, p. 446.)

Ms. Helen Restauri, the head mixer at National while Dolph was there, testified that Mr. Woods would give instructions to Dolph "a little more rougher than usual ... maybe yell at him to do it". (Evidence, vol. 1, pp. 215, 216.) Ms. Restauri testified that she heard Mr. Woods once call Dolph "retard" loudly, and on another occasion "stupid". (Evidence, vol. 1, p. 216.) She testified that Dolph would "frequently ... at least once a week" be yelled at, and singled out in front of other workers. (Evidence, vol. 1, pp. 218, 219; 224, 225.) She testified that Mr. Woods would get upset with Mr. Boehm's mistakes, and that Mr. Boehm in turn would get upset when Mr. Woods criticized him. Mr. Woods denied that he ever used the word "retard" or "retarded", or that he ever called Dolph

"stupid". He denied ever yelling at Dolph or centering him out. (Evidence, vol. 2, p. 443.)

Mr. Meidus also testified that Mr. Woods would "yell at [Dolph] a lot" and say "his job was on the line" to the point that Mr. Meidus would ask Mr. Woods to "take it easy on Dolph". (Evidence, vol. 1, pp. 232, 238.) Mr. Meidus could not recall Mr. Woods yelling at any other workers. Mr. Woods admitted that Mr. Meidus had spoken to him in this manner but claimed it was only because Mr. Meidus felt Dolph was overworked. (Evidence, vol. 2, pp. 382, 383.)

Mr. Woods rationalized his statements to Dolph by saying that he never "called him stupid, but would have said "That's a stupid thing to do"". (Evidence, vol. 2, p. 303.) Mr. Woods denied ever yelling at Dolph or treating him differently from other employees. (Evidence, vol. 2, pp. 383, 384.) He denied he had used the phrase "Get your ass over here" on an occasion when Dolph was outside the bakery at a bus stop and called back, but admitted he might use such a phrase within the bakery (Evidence, vol. 2, pp. 384, 385) and directed toward Dolph (Evidence, vol. 2, p. 400). Mr. Woods also denied that he had ever expressly or implicitly threatened Dolph with discharge from employment. (Evidence, vol. 2, pp. 432, 433.)

Mr. Woods denied that he would ever respond to Dolph with the phrase "No excuses, no excuses", which Dolph testified was commonly used. (Evidence, vol. 2, p. 454.)

Mr. Woods generally denied all of Mr. Boehm's accusations. He testified that Mr. Boehm gave him Christmas gifts, and never complained.

Through Mr. Woods, Mr. Boehm's sister obtained a part-time job with National in its Limeridge Mall store. (Evidence, vol. 1, p. 60.) When National was experiencing business difficulties, and closing some stores, some employees at the Complainant's store were laid off, including the Complainant, but after two weeks Mr. Woods called Mr. Boehm back to work. (Evidence, vol. 1, pp. 71, 72.)

Mr. Boehm testified that an oven mitt would be left daily in a side door of the bakery early in the morning to keep a door ajar, and that it was Mr. Boehm's job to remove it once all the employees had arrived for work. On one occasion, Mr. Boehm testified, when apparently the oven mitt had not been removed from the door as required (but it was determined later this was not the fault of Mr. Boehm), Mr. Woods grabbed him physically by the collar and led him to the door to remove the mitt, saying "if [you] can't handle it, we'll get someone that can". (Evidence, vol. 1, p. 26.) Mr. Woods later testified that he did not grab Dolph by the collar or speak improperly to him. Mr. Boehm testified that Mr. Wood did apologize to him later on in the day of the mitt incident when another employee assured Mr. Woods that Mr. Boehm had in fact secured the door. Mr. Boehm testified "But [Mr. Woods] had to wait to listen to the other employee, there again he wouldn't take my word". (Evidence, vol. 1, pp. 27, 28.)

Mr. Woods testified that,

> "One day when I came in [the oven mitt] was still there so I went to the back where Dolph was, I put my arm around him, and I didn't say a word at all to him and he just looked at me and we walked, in front of everyone, [sic] up and I said, "Look, the oven mitt is there again". I opened the door and I kicked it out. I said, "How many times have I told you, Dolph, not to leave the oven mitt in the door?". He said, "I pulled it out this morning". I said, "Dolph, it's there". He said, "No, Mr. Woods, I took the oven mitt out". I said, "Dolph, don't do it again."

Mr. Woods, did, at least, apologize to Mr. Boehm for his incorrect allegations in respect of the oven mitt incident. (Evidence, vol. 1, p. 97.) Mr. Woods apologized another time when he criticized Mr. Boehm unfairly in respect of a missing pail of cherry pie fill. (Evidence, vol. 1, pp. 112-115.)

On another occasion, Mr. Boehm testified that he had left the plant at the end of his shift and was standing at a bus stop across the street, when Mr. Woods demanded that he get his "ass back here" (Evidence, vol. 1, p. 24) to observe that the bakery plant was not clean. However, after showing Mr. Boehm the state of the bakery, it was Mr. Woods who cleaned it up. (Evidence, vol. 1, pp. 104-107.)

Brent Meidus testified that on an occasion he had left the bakery to go to his car when he heard Mr. Woods call Mr. Boehm back and that he then returned as well, although he was not called, because it was just as much his responsibility to ensure that the bakery was left clean.

It is clear that the Complainant felt he was both often singled out for criticism by Mr. Woods and also subjected to a

particular form of verbal abuse, simply because of his handicap. (Evidence, vol. 1, p. 50.)

For example, no one else was called back from the bus stop on the occasion he was called back, to be shown that the bakery was not cleaned. (Evidence, vol. 1, pp. 103, 104.) Nor was anyone else required to "eat a loaf of burnt bread or made to taste turnovers that they forgot to put the yeast in ... or eat turnovers that turned out flat" like he was in respect of the sugarless pie. (Evidence, vol. 1, p. 104.)

Mr. Boehm stated that Mr. Woods ridiculed the looks of a mentally handicapped girlfriend of Mr. Boehm who visited him at the plant on the occasion of Mr. Boehm's birthday. Mr. Woods testified that it was someone else who had said the girl looked like an "owl". (Evidence, vol. 2, p. 380.) Mr. Woods subsequently allowed that he might have made such a statement, but he "was not the first one to say that". (Evidence, vol. 2, p. 445.) Mr. Boehm felt that Mr. Woods considered his girlfriend and handicapped people generally as "less than human beings".

Mr. Boehm testified that Mr. Woods, who had met Mr. Boehm's younger sister,

> "...said that he observed my sister at Limeridge Mall and I was older than her and she was younger and that she was quite pretty and she was going to school. Then he asked me, he went, "Your parents made a mistake when they had you and they knew what they were doing when they had your sister". So, in other words, they didn't know how to produce babies so I came out handicapped and then they got the knack right and my sister came out okay, not handicapped." (Evidence, vol. 1, p. 32.)

Mr. Woods denied this allegation.

Mrs. Boehm testified that Dolph told her Mr. Woods would suggest to Dolph that he spend his money "on a lady of the night", asking him when he was going to become a man, and that he did not know what he was missing. (Evidence, vol. 1, pp. 255, 256.)

Angelline Bozo, a continuing longtime National employee, testified for the Respondents, saying that she never heard Mr. Woods yell or scream, never heard name-calling, and was generally unaware of any incidents of friction between Mr. Woods and Mr. Boehm. I have no doubt that Ms. Bozzo testified truthfully, but she worked "right in the back" at one end of the plant, (Evidence, vol. 1, p. 332) and seemed generally oblivious to what was happening with other employees, focusing entirely upon her work. She simply did not have knowledge of what was going on between Mr. Woods and Mr. Boehm.

Ronald Wilkinson, another continuing employee of National's, testified that in his experience in witnessing the interaction between Mr. Woods and Mr. Boehm, he never saw Mr. Woods yell or scream, never heard the word "retard" used, and finds Mr. Woods easy to get along with and not a malicious type of person. Mr. Wilkinson did testify that Mr. Woods occasionally used the word "stupid", but without malicious intent. (Evidence, vol. 1, pp. 354, 355.)

On February 21, 1984, Mr. Boehm was asked during the morning to unload from a conveyor belt the delivery of a truckload of

flour. This involved some 200 bags of 88 lbs. each, and took some time. When he went to commence the unloading, Mr. Boehm left his mixing tasks to the head mixer, Helen Restauri, who later confirmed this. (Evidence, vol. 1, pp. 123-129; 214.) However, Mr. Boehm testified, he was criticized by Mr. Woods that he had neglected his work, and when Mr. Boehm tried to explain that Helen Restauri had assumed his task as mixer while the truck was being unloaded he was told that Mr. Woods wanted "no excuses". (Evidence, vol. 1, pp. 37, 38.) Ms. Helen Restauri later testified that she had indeed agreed to do Dolph's mixing on the day in question, but due to extra work at one point, had forgotten. She also testified that Mr. Woods had not questioned her about the situation.

Mr. Boehm was then asked, shortly thereafter on the same day, by Mr. Woods to unload 400 bundles of cake boxes, which he did. Mr. Woods later testified that this particular day was very unusual in that the cake boxes, which only come perhaps every 18 months, arrived on the same day as a flour delivery. Mr. Boehm testified,

> "... it was very busy, and it was, like, all days, I could have handled it. It's not often you get days like that, but then the constant criticism again about the icing and "No excuses", it really upset me that there again, like, I tried to explain why and it was just, "no excuses, no excuses," he wouldn't listen." (Evidence, vol. 1, pp. 123-129.)

Although Mr. Boehm was scheduled to have the following day, February 22, as his day off, Mr. Woods asked him to work that day. Mr. Boehm was very upset, and vomited on the way home.

Mrs. Boehm testified that she called Mr. Woods' home the evening of February 21 and left the message that her son was too ill to work the next day, and also called the plant at 6:30 a.m., being the beginning of the shift the next morning, with a similar message.

Mrs. Boehm testified that Mr. Woods called the Boehm residence at about 9:00 a.m. February 22, asking Michael Boehm to request Dolph to come to the telephone. Dolph Boehm would not come to the phone, but did later call Mr. Woods back who, Mr. Boehm testified, criticized him for not being at work. (Evidence, vol. 1, p. 41.)

> "Mr. Fleishman: Q. Did you feel you could return to National after the events of that day?
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> A. No, the day and then the phone calls after and too, like it was never trust, "No excuses, no excuses," and, like, phone me at home; my feelings were, like, to make sure I wasn't fooling around and I wasn't, like, just playing games and I was out somewhere; phoning to check up on me, that's the type of feeling I had. It was, like, continually never letting me explain myself and then the phone calls at home and then they all built up and I figured I could no longer work under those - right from the time of the first letter and I never had a chance to explain myself and then with going to upper management I felt I did more than enough to try to clarify the situation and nothing I'd do, didn't seem to matter. The phone calls at home, my concern for the company didn't seem to matter. I was conscientious enough to phone the company and let them know of the absence, but it didn't seem to matter because I got a phone call with all kinds of derogatory remarks, why I was away and everything when, in fact, they had known why I was away. (Evidence, vol. 1, pp. 43, 44.)
>
> ... I enjoyed my work and everything but I could no longer handle it under those pressures and criticisms. I enjoyed my work previously, but ... Mr. Woods took over and became my parent. (Evidence, vol. 1, p. 45.)

Michael Boehm testified that Mr. Woods called again February 22 in the early afternoon to request of Dolph the details of a recipe, which Dolph related to Michael who then responded to Mr. Woods' request. Ms. Jones and Mr. Meidus testified that there were two copies of each recipe at the bakery, one in a file box in the working area, and a second upstairs in the office area. The Complainant alleges that it was unnecessary for Mr. Woods to telephone him at home for the recipe, and that this was done to harass him.

On February 23, Dolph Boehm attended at the office of his physician, Dr. George Osbaldeston.

Mrs. Boehm had called Dr. Osbaldeston February 22, 1984, advising that her son was very upset, shaking and vomiting. Dr. Osbaldeston testified that Dolph was "extremely upset" and evidenced fear and anxiety about his work. Dr. Osbaldeston said that the pie incident was the most concrete situation referred to by Dolph. Dr. Osbaldeston testified,

> "His major complaint was that on the [21st] he had a very difficult day at work; that he felt he could not compete, or could not carry out the tasks that were being assigned to him. He felt that he had made arrangements that this would be done. He became extremely upset that he couldn't meet the requirements that were being asked of him ... his immediate supervisor had forced him to eat a pie in front of other people as a punishment so that he would not make the same error again. The impression I got was that he became fearful that something would happen of the same nature if he couldn't complete his work or if he couldn't do what he was supposed to do. (Evidence, vol. 1, p. 150.)

Dr. Osbaldeston agreed with Dolph's statement that he was unable at that time to return to work, Dr. Osbaldeston being of

the opinion that Dolph should wait a couple of weeks. He felt that Dolph was fearful of being put into a situation where he might fail again. Dr. Osbaldeston's notes were filed as Exhibit 12. The situation that the Complainant related to his physician on February 23, 1984, was in accord with the Complainant's subsequent testimony at this hearing.

Dr. Osbaldeston testified that he saw Mr. Boehm again on March 9, 1984 at which time Dolph stated he could not return to National, cried in the doctor's office, and felt he was unable to carry the load requested of him as his supervisor, Mr. Woods, mae fun of him and was "on his back'. Mr. Boehm related to Dr. Osbaldeston how when he had given Mr. Woods his typed complaining letter (Exhibit #3) in 1983, that Mr. Woods had thrown the letter to the floor and laughed at him.

Dolph's mother testified that her son generally had a positive attitude toward people even though they might be mean to him. Moreover, she said that Dolph would not defend himself and had difficulty in standing up for himself. She testified that from the time Mr. Woods became Dolph's supervisor that Dolph would often come home upset, was often nervous, and that he began to lose the self-confidence in his ability that had been painstakingly built up over time. She said Dolph told the family that Mr. Woods would not listen to him, generally responding with "no excuses, no excuses". (Evidence, vol. 1, p. 249.) She said Dolph had told her about Mr. Woods stomping on the letter of complaint (Exhibit #5) she had drawn up at Dolph's request.

She testified she also learned of the October 6 pie incident from Dolph and that she spoke to Mr. Heagle about the incident. She testified that Dolph told her that while Mr. Woods responded to the situation by telling Dolph they should avoid each other, that Dolph said he also told Dolph he was a cry baby who could not fight his own battles. Mrs. Boehm also testified as to the telephone calls Dolph received at home from Mr. Woods. She testified that to her knowledge Dolph had twice received telephone calls at home from Mr. Woods criticizing him, and on several occasions Mr. Woods had telephoned Dolph at home for a recipe. Mr. Woods later testified that he may have called Dolph three times at home for recipes. He said he called Dolph at home on February 22, 1984, to see how Dolph was because Dolph had appeared fine to Mr. Woods when he had left work the day before.

Mrs. Boehm testified that although the pressures on Dolph were building, and that on occasion he would vomit or she would send him out the door to work "gaging" with apprehension, she knew it would be difficult for Dolph to get another job.

Michael Boehm later testified that toward the end of Dolph's employment with National, Dolph would sometimes be heard to be crying in the bathroom in the mornings, saying "I don't want to go", (Evidence, vol. 1, p. 304) and would have recurring nightmares.

Mrs. Boehm testified that on February 21, 1984, Dolph came home about 4:00 p.m. with vomit on his coat, complaining of a headache, very upset, and related what had happened at work that

day. She said she called Mr. Woods home about 9:00 p.m. that evening and left a message with Mrs. Woods that Dolph was sick and would not be at work the next day, and called the bakery at 6:30 a.m. the next morning leaving the same message. She testified further that when told the next day about Mr. Woods telephone calls to the home, she herself called Mr. Woods about 3:00 p.m. to say Dolph would not be in the following day, whereupon, she testified, Mr. Woods responded by saying that as that would be Dolph's day off in any event he did not "have to drag his ass in". (Evidence, vol. 1, p. 260.)

Mrs. Boehm testified that her son's extreme upsetedness, and position taken that he simply could not return to work, caused her to ask Dr. Osbaldeston to see Dolph on February 23.

Mrs. Boehm testified that for a few days Dolph was so nervous he could not answer the phone, was paranoid to the point of being afraid Mr. Woods would climb in a window coming after him, and for five or six weeks would only leave the house if accompanied by his father or mother.

When Mrs. Boehm asked Dolph to go back to work at one point, he threw a rocking chair and threatened to kill himself. It was at that point that Mr. and Mrs. Boehm told Dolph he did not have to return to National.

After receipt of the letter in 1982, and certainly after the complaint by Dolph's parents about the pie-eating incident, Mr. Woods should have been cognizant of Dolph's sensitivity and his adverse reaction (if largely internalized) to Mr. Woods

behaviour. Yet Mr. Woods testified that he could "not see a problem." (Evidence, vol. 2, p. 456.)

Bruce Heagle, vice-president and chief operating manager (and formerly general manager) for National testified. He said that he was not aware of any harassment of Dolph by Mr. Woods, that no staff member had ever mentioned it, and Dolph always seemed happy at work. (Evidence, vol. 2, p. 468.) The only complaint he ever received was from Dolph's mother and father, over the pie incident. Mr. Heagle testified they told him that Mr. Woods "literally ... day to day had berated Dolph, that he had centred him out in front of other employees and more or less made his life miserable". (Evidence, vol. 2, pp. 471, 484, 487.) Mr. Heagle told them he would look into the pie incident and if there were further problems they should come to him immediately. Mr. Heagle said that he then got a completely different version of the incident at the time from Mr. Woods, so he dealt with the matter by saying the Mr. Woods should be aware of Dolph's sensitivity in the future, (Evidence, vol. 2, p. 474) and by telling Dolph's parents that if there were further problems, to see Mr. Heagle. Perhaps Mr. Heagle would have been wiser to have checked upon the pie incident with the other employees at the time, but he did not. He testified that nothing further was brought to his attention.

Harold Pettifer, an individual Respondent, recently retired after 46 years in the bakery business, who for the years 1980 to 1985 worked in Hamilton for National performing the task of

"quality assurance", testified that he had never heard Mr. Woods yell at anyone. However, Mr. Woods had brought Dolph's letter dated September 3, 1982, to Mr. Pettifer's attention. Mr. Pettifer knew the Complainant well, and they would talk easily together when Mr. Pettifer was in the bakery. They attended the same church. Mr. Pettifer testified that Mr. Boehm never complained to him about Mr. Woods, and never appeared to have any problems.

Mr. Pettifer had helped to train Dolph, saw him often in the bakery and at church, felt he knew Dolph quite well, and as Dolph never shied away from talking with him, felt that Dolph could approach him with any work problems. (Evidence, vol. 2, pp. 495, 496.) Dolph never appeared to have a problem or complained to Mr. Petiffer about Mr. Woods. (Evidence, vol. 2, pp. 498-501, 507.)

The Complainant testified that although he used to talk with Mr. Pettifer and got along well with him, and Mr. Pettifer would ask him how he was doing, that the Complainant did not raise his continuing problems with Mr. Woods,

> "... because I'm not a fighter and the time the meeting was arranged I just got punished for it so there was no point. It became gradually worse after the apple pie incident. The harassments became heavier, they became more severe. I was never called -"If you like your job and want to keep it," and, "You need a kick in the ass," that was before but I was never called a retard before or a dummy. Then after the apple pie and the oven mitt incident I was called a dummy and a retard..." (Evidence, vol. 1, pp. 75, 76.)

It is clear that National continued to offer Mr. Boehm his job back (Evidence, vol. 1, p. 266). However, Mr. Boehm just

could not face Mr. Woods again. I have no doubt of the reality of Mr. Boehm's inability to return to work from his subjective standpoint.

Before concluding this discussion of the evidence, I want to compliment Respondents' counsel in the way in which he conducted himself in this hearing. While rigorously thorough in every aspect, he had the good sense and judgment to conduct his clients case in a manner which, while putting their defence forward at all times very ably and as forcefully as possible, took fully into account the obvious sensitivities of the Complainant and his family.

3. The Law and Findings in Respect of the Evidence.

Having reviewed the evidence, it is now appropriate to consider the applicable law, and make my findings on the evidence. I have already reviewed human rights law generally as it relates to those with disabilities, in Cindy Cameron v. Nel-Gor Nursing Home (1984) 5 C.H.R.R. D/2170 (Ont. Bd. of Inquiry) and Wayne Mahon v. Canadian Pacific Railway (1985) 7 C.H.R.R. D/3278 (federal tribunal).

It is purposeful to divide the discussion into five sub-topics in addressing the instant situation and the specific subject of harassment and the rights of those with disabilities: (1) Harassment and Human Rights in the United States; (2) Harassment in Ontario and the Old Code; (3) Harassment because of

Handicap in Ontario and the Present Code, and Findings in respect of the Evidence; (4) Corporate Responsibility;and (5) the Ontario Bill 7 amendments of December 18, 1986.

(1) Harassment and Human Rights in the United States.

American human rights legislation does not appear to address the question of harassment by employers specifically. The law of harassment has therefore been subsumed in the larger, more general topic of discrimination, as was the case in Ontario before the new Code, which came into force June 15, 1982.

The most important source of protection for victims of discrimination is Title VII of the Civil Rights Act of 1964 (42 U.S.C. ss.2000e et seq; P.L. 88-352), section 703(a) which provides that...

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin... (emphasis added)

The Rehabilitation Act of 1972 29 U.S.C. 791; P.L. 93-112, the pre-eminent federal statute protecting the rights of the physically and mentally disabled, contains similar wording in its Title V, Section 504 providing that,

> No otherwise qualified handicapped individual... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... (emphasis added)

As one might expect, the most frequent source of claims founded upon harassing behaviour is sexual discrimination. Sexual harassment, unlike harassment on other grounds, falls into two categories. The first category, so-called "quid pro quo" harassment (requiring sexual favours in return for economic benefits in the form of employment), is unique to sexual harassment, but the second category, the "hostile environment" notion of harassment, is easily transferable by analogy to another situation, for example, where there is harassment of a handicapped person.

In the recent decision, Meritor Savings Bank v. Vinson (1986) 54 L.W. 4703, the United States Supreme Court considered the claim of a female bank employee based on Title VII. The Vinson decision (written, significantly, by Justice Rehnquist, now Chief Justice) adopted the Federal Court of Appeal judgement in Rogers v. E.E.O.C. (454 F. 2d 234) (1971). The Supreme Court quoted (at 4706) with approval the following passage from the Rogers decision:

> "The phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with

> ethnic or racial discrimination... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers..."(454 F. 2d, at 238)

The Supreme court endorsed the proposition that harassment is actionable under Title VII, but required that it be "sufficiently severe or persuasive to alter the conditions of the victim's employment and create an abusive working environment". (at 4707)

This logic has been worked out in a number of cases based upon discrimination on other prohibited grounds. Thus, in Firefighters Institute for Racial Equality v. St. Louis (549 F. 2d. 506, cert. denied 434 U.S. 819) racial harassment was found to constitute a violation of Title VII. Similarly, religious harassment (Composton v. Borden, Inc., 424 F. Supp. 157) and harassment because of national origin (Cariddi v. Kansas City Chiefs Football Club, 568 F. 2d 87) have been held to violate the civil rights of the complainants under Title VII.

The American position with regard to harassment of individuals on the grounds of physical or mental disability has not yet been tested in litigation under section 504 of the Rehabilitation Act, (supra). There is, however, no reason to believe that someone who was the victim of such harassment could not bring a claim under section 504. Where harassment constitutes a denial, exclusion on other discriminatory behaviour relating to a federally assisted programme the section should

provide relief, just as section 703(a) of Title VII of the Civil Rights Act of 1964 has provided relief in respect of the prohibited grounds of discrimination enumerated therein.

(2) Harassment in Ontario and the Old Code.

Prior to the Ontario Human Rights Act, 1981 there was not any provision in Ontario's human rights legislation which explicitly recognized the right of an employee to be free from harassment by his or her employer. Where, however, the harassment was so persistent and severe that it effectively changed the terms or conditions of employment for an individual, the general anti-discrimination provisions proved to be broad enough to provide a remedy.

In Dhillon v. F.W. Woolworth Co. Ltd. (1982) 3 C.H.R.R. D/743, (Ont. Bd. of Inquiry) I had an opportunity to consider just such a case under the Ontario Human Rights Code, R.S.O. 1980, c.340, as amended. In Dhillon the complainant was subjected to constant racial name calling and verbal abuse. The harassment was racially motivated, extensive and ongoing. Such harassment, where it alters the emotional and psychological circumstances of employment, was held to create a special "term or condition of employment" to which only the harassed individual or minority is exposed. It was held to be discrimination and hence morally and legally unsustainable.

The notion of harassment constituting discrimination is central to the development of anti-harassment jurisprudence in Canada and the United States [see above for a discussion of the American law]. Only Ontario, Quebec, Newfoundland and the federal government to date have legislated against harassment per se. All other Canadian jurisdictions rely on the implicit prohibition in the general anti-discrimination sections of their human rights statutes.

This "implicit" approach to harassment presents some problems. What of the employer who harasses all employees equally? To borrow an example from (now Chief) Justice Rehnquist of the U.S. Supreme Court, consider whether such a notion of harassment could provide relief where a bisexual employer sexually harasses all employees? (See Meriton Savings Bank, supra at 4706.)

This unfortunate failing of the implicit conception of harassment is illustrated by the case Beuza et al v. Dakota Ojibway Tribal Council et al (1986) 7. C.H.R.R. D/3225. There, the Manitoba Court of Appeal reviewed the decision of a board of adjudication on a complaint of discrimination in accommodation. It was alleged that the operators of a motor lodge had engaged in discriminatory conduct against several members of the Dakota Ojibway Band. The board found that the operators of the respondent motor inn had verbally abused the complainants and that the abuse was based upon the complainants' native status.

This finding was not disturbed on appeal. (Dakota Ojibway Tribal Council et al (1986) v. Beuza et al 7 C.H.R.R. D/3217)

However, Twaddle, J.A., writing for the court, held that verbal harassment did not constitute a violation of the Manitoba Human Rights Act unless it was proven that it was accompanied by some different treatment constituting discrimination. At D/3231 he says:

> "Here the hostility of [the respondent] to, and her prejudice against, Indians may or may not have influenced her conduct, but in the absence of proof that the guests were treated differently from other guests in similar circumstances she is not guilty of a contravention of the [Manitoba Human Rights] Act. However, if a finding could be made that the abusive conduct was motivated because the guest was a native person then that finding in itself would arguably imply discrimination." (emphasis added)

This proposition was endorsed and enhanced in Janzen and Govereau v. Platy Enterprises et al. [1987] 1 W.W.R. 385 (Man. C.A.).* There, the Manitoba Court of Appeal was considering the issue of sexual harassment in employment. Mr. Justice Huband, (speaking for himself), had this to say on the asserted implicit inclusion of harassment in discrimination (at p.390):

> "I am amazed to think that sexual harassment has been equated with discrimination on the basis of sex. I think they are entirely

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* The case was heard by Matas, Huband and Twaddle, J.J.A.. Matas J.A. took no part in the judgement while Huband, J.A. and Twaddle, J.A. wrote separate decisions reaching the same result through similar reasoning.

> different concepts. But adjudicators under human rights legislation, legal scholars and writers, and jurists have said that the one is included in the other."

His Lordship considered the Manitoba Human Rights Act as a whole, referring to those sections dealing with discrimination in advertising, accommodation, and other contractual relationships, and concluded that ,..."[t]he focus of the Act is not on the workplace, but upon this wide range of human relationships where discrimination - but not sexual harassment - is to be precluded". (p.400-401)

In reaching this conclusion Huband, J.A. has rejected the reasoning of many tribunals and at least two Courts of Appeal in other Canadian jurisdictions. (see e.g. Bell v. Ladas (1980), 1 C.H.R.R. D/155 (O. Shime; Ont. Bd. of Inquiry) Coutroubis v. Sklavos Printing (1981), 2 C.H.R.R. D/457 (Ont. Bd. of Inquiry; E.J. Ratushney); Hughes v. Dollar Snack Bar (1981), 3 C.H.R.R. D/1014 (Ont. Bd. of Inquiry; R.W. Kerr; Cox v. Jagbritte Inc. (1981), 3 C.H.R.R. D/609 (Ont. Bd. of Inquiry; P.A. Cumming); Mitchell v. Traveller Inn (Sudbury) Ltd. (1981), 2 C.H.R.R. D/590 (Ont. Bd. of Inquiry; R.W. Kerr); Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858 (Ont. Bd. of Inquiry; P.A. Cumming); McPherson v. Mary's Donuts (1982), 3 C.H.R.R. D/961 (Ont. Bd. of Inquiry; P.A. Cumming); Olarte v. Commodore Bus. Machines Ltd. (1983), 83 C.L.L.C. 17,028, 4 C.H.R.R. D/1705 (Ont. Bd. of Inquiry; P.A. Cumming), (appeal dismissed by Ontario

Divisional Court, (1984) 49 O.R. (2d) 17 sub. nom., Re Commodore Business Machines Ltd. et al and Minister of Labour for Ontario et al.); Deisting v. Dollar Pizza (1978) Ltd. (1982), 3 C.H.R.R. D/898 (Alta. Bd. of Inquiry; C.P. Clarke); Hufnagel v. Osama Ent. Ltd. (1982), 3 C.H.R.R. D/922 (Man. Bd. of Adjud.); and at the Court of Appeal level, Brennan v. R., [1984] 2 F.C. 799, 85 C.L.L.C. 17,006, 6 C.H.R.R. D/2695 (Fed. C.A).; and Mehta v. MacKinnon (1985), 19 D.L.R. (4th) 148, Nova Scotia S.C. (A.D.)). As we have seen in the discussion supra, the same reasoning and approach as followed in the above cases, is found in the American jurisprudence. With respect, I am of the view that the Manitoba Court of Appeal is incorrect in its analysis, for several reasons.

The ratio behind this attack on what had been a widely accepted doctrine of interpretation is simple enough. Huband, J.A. states, at p. 402:

> "The problem is that [the Boards' and their] "creative interpretations" have gone too far in stretching the meaning of discrimination as it is used in the statute in order to make a "penetration into the workplace", which is unwarranted and unintended. If legislators wish to prohibit sexual harassment in the workplace, or anywhere else, they are quite capable of saying so in clear and explicit terms."

The central thesis in Huband, J.A.'s approach is that "discrimination" only deals with generic classifications. An employer cannot say "I will not hire women". Nor can he bother all women so as to make employment intolerable. Both of these

situations involve an attack on a group identifiable and discrete. Bothering a particular woman employee, because she is a woman, is not an attack on a generic grouping but rather an attack on a member of a group incidental to such membership. He says, at p.398:

> "Viewing the section as a whole, it is my conclusion that it is aimed at discrimination in a generic sense; blacks as a group, Jehovah's Witnesses as a group, or women as a group. That concept is also reflected in other provisions of the Act. Section 6(1) deals with discrimination in employment...Section 2(1) bars discrimination because of sex and other grounds, in terms of advertisements, notices or broadcasts. I think it is quite clear that the word "discrimination" as used in s.2(1) was never intended to include or relate to sexual harassment."

Mr. Justice Twaddle, the other member of this appellate court panel, reached the same conclusion as Huband, J.A.. He draws support from the amendments to the Federal statute and those in Quebec, Newfoundland and Ontario to include explicitly harassment in the legislative scheme. Twaddle J.A., also endorses the limited notion of discrimination proposed by Huband J.A. (at p.422):

> "Harassment is as different from discrimination as assault is from random selection. The victim of assault may be chosen at random just as the victim of harassment may be chosen because of categorical distinction, but it is nonsense to say that harassment is discrimination.

> The introduction of a sexual element, be it the nature of the conduct or the gender of the victim, does not alter the basic fact that harassment and assault are acts, whilst discrimination and random selection are methods of choice.
>
> The fact that harassment is sexual in form does not determine the reason why the victim was chosen. Only if the woman was chosen on a categorical basis, without regard to individual characteristics, can the harassment be a manifestation of discrimination. (emphasis added)
>
> (and at p. 425)
> "For the harassment to amount to discrimination, it must have occurred by reason of the categorical selection of the complainants because they were women."

I must say, with respect, that I am surprised to learn that Huband, J.A. is, "... amazed to think that sexual harassment has been equated with discrimination on the basis of sex ... " and that he holds the view that they "are entirely different concepts" (see Janzen, supra, p. 390) for two reasons.

Given that human rights legislation has as one of its objectives equality of opportunity in employment, that is, employment and advancement based upon merit, it is clear that sexual harassment, as a form of discriminatory conduct, should be prohibited. Sexual harassment occurs when an employer treats an employee differently and adversely because of the sex of that employee. Harassment because of gender is simply one form or manifestation of gender discrimination. Yet it is this simple

and commonly held view of the law which Huband, J.A. has rejected.

Mr. Justice Huband suggests that it is "... torturing the Queen's English", for Parliament to state in the Canadian Human Rights Act s.c. 1976-77 c.33 s.13.1 (as amended S.C. 1980-81-82-83 c.143) that, "...[i]t is a discriminatory practice ... in matters related to employment, to harass an individual on a prohibited ground of discrimination" (see Janzen, supra, p. 396).

The question before the Court of Appeal in Janzen, however, was not, of course, whether a prohibition against sexual harassment should be a part of Manitoba's human rights legislation but rather whether such a prohibition is in fact implicit in the existing general anti-discrimination provisions of the Act. This must be the question in every jurisdiction examining the place of harassing behaviour under a general anti-discriminatory provision. In some provinces (Quebec, Newfoundland and Ontario) and in the federal sphere the legislatures have decided to use express language where before an implicit prohibition had been sufficient. Given this obvious advantage of clarity and certainty which an express prohibition allows, these new provisions are to be applauded. It seems ironic, however, at the least, that in making its own progressive policies explicit a legislature may endanger equally progressive implicit assumptions about general legislation in another province.

The legislative history of the Ontario provision suggests that the government of the day viewed the explicit inclusions of harassment as a measure to clarify existing rights rather than to create new ones. The Honorable Mr. Robert Elgie, then Minister of Labour, explained the amendment to the Legislature as follows:

> "Harassment, defined as engaging in a course of vexatious comment or conduct, is specifically prohibited in the context of employment and accommodation and protection from sexual harassment is made explicit. (emphasis added)
> (Debates of the Ontario Legislature, 1981, p. 743)

In my view the more general language found in legislation without explicit provisions also prohibits sexual harassment in employment. It is clear that the legislative history of these provisions, at least in Ontario, supports the view that the amendments regarding sexual harassment were for greater certainty.

In my respectful view, Huband, J.A. misconstrues the concluding words to paragraph 6(1)(a) ("... or discriminate against that person in respect of employment or any term or condition of employment") when he limits those words to things like, "... an employee benefit plan where benefits or privileges are given to one class of employees and not others". (Janzen, supra, p. 397.) For an employer to require an employee to tolerate harassment because of her gender is no different from requiring her to tolerate lower wages or longer hours because of her gender. Both impose a term or condition of employment noted in the fact of her sex. Put simply, she would not have to endure the sexual harassment if she were not female. It is irrelevant

that the employer does not sexually harass all his female employees. Once he discriminates "against that [particular] person" because she is a female employee, then there is, it would seem to me, a breach of paragraph 6(1)(a) of the Manitoba Act.

Huband, J.A. goes on to note that paragraph 6(1)(a) of the Manitoba Act is limited to discriminatory behaviour "by an employer or person acting on behalf of an employer". This, he suggests, presents an anomaly because it allows employees like the cook in the Janzen situation to behave as they please since they are " ... neither the employer, nor are they acting on his behalf". (It is to be noted that Ontario's Code is seen literally to be more generally applicable, prohibiting harassment by "... the employer or agent of the employer or by another employee ..." (s.4(2) S.O. 1981 c.53)). His Lordship argues that "... [i]f the legislature intended to deal with sexual harassment, they would surely do so in terms that would interdict such conduct by all persons in the work place". (Janzen, supra, p. 397.)

I note respectfully that employers and parties acting on their behalf are plainly uppermost in the mind of the legislature when it considers the evil of discrimination in employment. The relationship between employer and employee offers a unique and therefore particularly distressing opportunity for discrimination. There is an irony in reasoning that the failure to provide a more sweeping application of this section implicitly requires a narrowing of the substantive content of the section.

His Lordship also addressed the organic theory of corporate responsibility. He considers that this legal concept is "appropriate" for human rights case (see below for a discussion of how this theory applies to Mr. Boehm's Complaint) Thus, Huband, J.A. reasons, paragraph 6(1)(a) would reach the employer himself (any action done by him or condoned by him), anyone acting on his behalf, and, where the employer is a corporate entity, any person acting as a part of the directing mind in the course of his employment. He says at, p. 410, considering the work of P.S. Atiyah, Vicarious Liability in the Law of Torts, (1967),

> "... [t]he distinction between vicarious liability and personal liability has little importance in the law of tort. In both cases the liability will be imposed if the employee - whether the operating mind of the corporation or not - is acting within his authority or ostensible authority, and is in the course of his employment"

This passage as utilized seems to blur two tests into one, that is, it blurs the test for vicarious liability of an employer, human or corporate (which generally only arises with acts of negligence 'in the course of employment') and the test for corporate personal liability (which arises because of intentional acts of "the directing mind and will of the corporation"). It is only necessary to demonstrate that the act was done in the course of the employer's business being carried on (or put otherwise, in performing the corporate functions) if that act was done by someone possessed of the status of "directing mind". It is not relevant that the wrongdoer's

criminal or unlawful act, done intentionally and without authority, was an act repugnant to the employer (or other persons constituting more senior management of the employer).

The cook in the Janzen situation had been given disciplinary authority. To this end the corporation dressed him with the power to hire and fire. (While the cook did not in fact have this power the facts seem clear that "for disciplinary purposes the waitressing staff were left with the impression that he did have [such authority]", Janzen at p. 410). With respect, the proper question is not the one Huband J.A. puts, namely, "... what has patting the buttocks of a waitress to do with fulfilling the responsibilities of a cook?" (at p. 411) The correct question is, was the cook acting in the course of carrying on the corporation's business, when he would pat the buttocks of the waitress? On the facts reported in the Janzen case it is my respectful opinion that he was acting in this way.

Such an understanding of the organic and vicarious notions of liability is consistent with the purpose and context of sexual harassment prohibitions. Where a "mere employee" (that is, an employee who's activities form no part of the directing mind) acts to harass a co-worker and does so without the authority of his employer, the employer is entirely innocent of wrongdoing. An employer should not be vicariously responsible for intentionally unlawful acts, being acts of harassment, when the wrongdoer is a mere employee. Thus, subsection 44(1) of the Code does not impose vicarious liability in the harassment situation.

Similarly, an employer would not be vicariously liable for a crime committed by a mere employee in the course of carrying on the employer's business.

Moreover, there is nothing preventing the harassed co-worker from taking steps to eliminate the harassment when the offender is a mere employee, through simply going to the employer. Where, however, some part of the directing mind of the corporate employer endorses (either tacitly or explicitly) harassment, or even worse, requires it, the employer's own economic and disciplinary power has been utilized against the harassed co-worker. It is the employer itself (through a part of the directing mind), which is harassing. The intention of the directing mind is itself the intention of the corporate entity. The employer is personally a wrongdoer, and therefore, personally liable. Similarly, if the directing mind conspires to commit a crime in carrying on the corporate entity's business, then the corporate entity is itself conspiring to commit the crime.

A corporation necessarily acts through human agents. Its authority and powers are divided among many and each acts with the force of that fictional legal personality. Once that clothing of corporate authority is given the acts of the authorized party are the acts of the corporation. This is a function not of employment law but of agency law and corporate law. I say respectfully that it unnecessarily confuses the problem to import a test, as done in Janzen, from the doctrine of

vicarious liability relating to "in the course of employment" to this question.

The remaining question in Janzen, whether the cook was part of the directing mind of the respondent business, is not a difficult question but simply a factual one to be determined. While it seems to me from reading the reported decision that a cogent argument could be made on either side of the question, cutting through all the facts, it might well be asserted that the cook was 'in charge' on the night shifts, being when the acts of harassment took place. If this were the finding, in my opinion, with respect, the cook would then properly be considered to be part of the directing mind.

I have taken some time to address the issues raised by the Janzen case for two reasons. First, the case has resurrected a number of questions which many in the human rights field had considered to have been resolved. Second, the issues presented are relevant to our present inquiry as to whether the organic theory applies to render National in breach of the Code.

Following the release of the Janzen decision, the Hon. Roland Penner, the Attorney General for Manitoba, announced that his government would introduce amending legislation, to result in statutory provisions similar to that which Ontario now has.

Fortunately, in Ontario, an inquiry as to whether harassment is implicitly prohibited by discrimination provisions, is no longer necessary. Harassment per se in employment on prohibited grounds is now expressly recognized as a manifestation of

prejudice as poisonous and harmful as any other unlawful manifestation of discrimination. This is in keeping with the high purposes of the Code to "recognize the dignity and worth of every person..." and to create "a climate of understanding and mutual respect... so that each person feels a part of the community and [is] able to contribute to the development and well-being of the community and the Province" (see Preamble, Human Rights Code, 1981).

A human rights code is intended to do more than merely preserve minimum access to basic resources like housing or employment for minority or disadvantaged groups. It secures dignity and self-respect and enforces our political, philosophical and social belief in the basic rights of individuals to strive and participate equally in the social as well as the economic fabric of society. It is not merely a command to hire thy brother and sister. The Code goes further and prohibits employers or their agents from using their economic authority to express their malicious or ignorant views "in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" (paragraph 9(f)) in the provision of accommodation (subsection 2(2)) or in employment (subsection 4(2)).

(3) Harassment because of Handicap in Ontario and the Present Code and Findings in respect of the Evidence.

A. Elements Necessary to Sustain a Complaint of Harassment.

In order to sustain a complaint in harassment under subsection 4(2) of the Code in a case such as the instant one it is necessary to establish the following elements.

(1) The respondent engaged in a course of vexatious comment or conduct;

(2) At the relevant times the complainant was an employee and the respondent was the employer or agent of the employer;

(3) That the comment or conduct complained of was known, or ought reasonably have been known to be unwelcome; and

(4) That the conduct complained of was for the reason that the complainant has or is believed to have a condition of mental impairment or a learning disability.

Let us now consider these elements in the context of the evidence.

(1) "A course of vexatious comment or conduct..."

In Wei Fu v. The Queen et al (1985) (6 C.H.R.R. D/2797, (Ont. Bd. of Inquiry) I had an opportunity to consider this definition in the context of an allegation of racial harassment. There I noted, at D/2799, that:

> Clearly, racial jokes, insults, slurs or other "comment " such as false and embarrassing accusations of misbehaviour could amount to "harassment" as defined, and conduct would include discriminatory treatment with respect to postings, transfers, hours of work, or other working conditions. Simply "picking-on" an employee because of his race could constitute harassment.

It cannot be argued that the behaviour of the Respondent Woods did not constitute a "course of vexatious comment or conduct". To be vexatious, the comment or conduct must cause vexation, that is, be irritating, annoying or distressing. To vex is to irritate or annoy by petty provocations. See Webster's New Collegiate Dictionary, Thomas Allen & Son Limited, Toronto, 1976, at pp. 1302, 1303. In Myrtella Cuff v. Gypsy Restaurant (Ont. Bd. of Inquiry; A.F. Bayefsky) (as yet unreported; decision given February 6, 1987) the Board noted that the measure of what is "vexatious" is subjective. The proper question is whether the "comment or conduct [was] vexatious to this complainant" (at p.34).

I accept the evidence of Dolph Boehm, as to the incidents of harassment, and I reject the asserted defences of the Respondent Woods. I have no doubt that the Complainant, his mother, and his brother were truthful. Moreover, the Complainant's testimony was

generally corroborated by the testimony of other workers. The Respondent Woods' yelling at the Complainant, his abusive tone and ridiculing attitude, his unwarranted threats of dismissal, his cruel behaviour in the pie incident, his use of terms such as "retard", "dummy", "stupid" and "people like these", his ridicule of the Complainant Boehm's relationship with his girlfriend, his physical handling of the Complainant in respect of the oven mitt incident, and his comments to the Complainant regarding Boehm's parents' ability in reproducing are plainly sufficient to manifest a course of comment and conduct toward the Complainant which is vexatious. Mr. Boehm was singled out by Mr. Woods for adverse treatment, because of his disability. Put simply, Mr. Woods would not, and did not, treat non-handicapped employees in the harassing manner that he treated Mr. Boehm.

The crux of the harassment in the instant case is the humiliation the Complainant received from his supervisor. He was treated as inferior, as someone who did not deserve the same respect as the so-called normal employee. Although the name-calling itself was not all that frequent, the pervasive environment for Mr. Boehm in his relationship with Mr. Woods was one of disrespect because Mr. Woods regarded Mr. Boehm as inferior because of his handicap, and let him know this. I am not sure whether Mr. Woods' navy background had any relationship to his treatment of Mr. Boehm; however, one sees commonly this type of 'pecking order' in a military structure where power

relationships are certain, clear and unrestricted in terms of vexatious comments and conduct.

Mr. Woods was cruel and mean toward Mr. Boehm in his treatment of him. In this case, as I have said, the offending supervisor was aware that his conduct and comments were unwelcome. Having said that, I add that I do not think Mr. Woods intended Mr. Boehm to have the severe mental anguish he did. Mr. Woods intended to annoy him, to put him down and to hurt him. This is enough to constitute harassment. However, I add as an obiter that, in my view, where a disabled person is an employee there is an obligation upon the supervisor not to use even relatively innocuous conversation which might not offend non-disabled persons, if such conversation can be reasonably perceived to be hurtful to the disabled employee. That is, the sensitivity of the disabled employee must be reasonably accommodated.

(2) "Employer or agent of the employer..."

It is not disputed that the Complainant was an employee and that the activities complained of (with the possible exception of the telephone call of February 22) took place in the work place. Nor has it been suggested, of course, that the Respondent Woods was not an agent of the employer. Indeed, Mr. Woods was the production manager, with full managerial authority over the

Complainant and other staff. I will discuss later the law relating to the liability of the corporate employer.

(3) "Known or reasonably ought to have been known to be unwelcome...."

This standard applies a subjective as well an objective analysis to the behaviour of the Respondent. Ignorance or insensitivity are not defences under this test. In this case it is unnecessary to determine if someone in the Respondent Woods position "ought to have known" the course of conduct was unwelcome. Mr. Woods knew that his conduct was unwelcome - in fact, as I find on the evidence, it was in part because it was unwelcome that he engaged in the conduct. There was a petty meanness present in the treatment of the Complainant. Any disabled person would be sensitive to such abuse, and this would be known to Mr. Woods. Although Mr. Woods did not intend or realize the catastrophic impact of his vexatious comments and conduct upon the Complainant, knowing and intending that such comments and conduct would hurt, he must bear responsibility for all the consequences that ensued from his actions.

(4) "Because of handicap".

It is well established that it is sufficient to constitute unlawful discrimination if handicap (or any other prohibited

ground) is a part of the motivation for the prohibited activity. In Hendrez v. L.C.B.O. (1980) 1 C.H.R.R. D/160 (Ont. Bd. of Inquiry; D. Soberman) the board noted that a refusal to hire was because of a prohibited ground where that ground was, "a material cause, that is, a proximate cause, one that played a part even if subconsciously and even if present with other causes in the [discriminatory behaviour]" (at D/162). This is, of course, merely one example of the application of the doctrine first expressed in R. v. Bushnell Communications Ltd. ((1973), 1 O.R. (2d) 442, H.C.). I have discussed at length the issue of "mixed motives" in Arny Iancu v. Simcoe County Board of Education, (1983) 4 C.H.R.R. D/1203 at D/1204 to D/1207 (Ont. Bd. of Inquiry) and Barbara Joyce Haila v. Mike Nestoras, carrying on business as Welland Plaza Restaurant, a decision of February 4, 1987, involving discrimination because of handicap (Ont. Bd. of Inquiry, as yet unreported).

There is no evidence to suggest that there was any justification for the behaviour of Mr. Woods. Nor could there be. Some incidents, however, are claimed to be legitimate forms of disciplinary actions by a supervisor. Even if this were so (and I do not think it is on the evidence) I find that the Complainant's condition of mental impairment was at least a proximate cause of the intensity and quality of the Respondent Woods' behaviour toward the Complainant, and further find that the Complainant's condition was the sole reason for many of the derisive comments made by Mr. Woods.

I find that the Respondent Woods' behaviour constitutes harassment because of handicap and that there has been a violation of subsection 4(2) and section 8 of the Code.

Incidentally, while I have considered it proper to resolve this Complaint under subsection 4(2) of the Code I should note the Mr. Boehm has also asserted his Complaint under subsection 4(1). Whether the behaviour of the respondents in the instant case could also constitute a violation of subsection 4(1) remains a live issue in this province and nothing in this decision should be read as resolving that question. It is unnecessary to decide that question in this case.

B. Corporate Responsibility.

Section 44 of the present Code provides for the vicarious liability of a corporate employer in the case of certain violations of the legislation. Complaints of harassment are not subject to this statutory vicarious liability. The corporate Respondent, as a corporate employer, may however be held responsible on the organic theory of corporate liability. I have previously considered the law relating to corporate responsibility in this area (see Edilma Olarte et al v. Rafael DeFilippis and Commodore Business Machines Ltd. (1983) 4 C.H.R.R. D/1705; and Wei Fu v. The Queen et al, supra). Where an employee acts as a part of the "directing mind" of the corporate employer, and is not a "mere" employee, that employee's actions

are organically part of the employer's actions and as such the employer must be liable also. "Once an employee is a part of the directing mind and the contravention of the Code comes in his performing of his corporate functions, the corporation is itself also personally in breach of the Code" (emphasis added) (Wei Fu v. The Queen et al, supra, at D/2801). Clearly in the instant situation, the actions of the Respondent Woods toward the Complainant came in the course of Mr. Woods performing his corporate functions as production manager. The Respondent Woods was part of management and his unlawful acts toward the Complainant are at law the acts not only of himself as an individual but also the acts of the corporation itself. For this reason, the Respondent National is itself in breach of subsection 4(2) and section 8 of the Code.

This is not a theory of vicarious liability. I emphasize this given the confusion that may be introduced to the subject area by the Janzen decision, discussed above. Rather, it is a doctrine which recognizes that the corporation may be held responsible personally. An artificial entity, like a corporation, which has the status of a flesh and blood individual through the operation of law, can only act through those individuals who direct and manage its affairs.

(5) Bill 7 Amendments, December 18, 1986

I shall now review briefly the recent amendments to the Code, for two reasons. First, the amendments as they relate to discrimination on the prohibited ground of "handicap" modify the general commentary set forth in Cindy Cameron v. Nel-Gor Nursing Home ,supra. Second, although the amendments do not affect, of course, the case at hand (having been enacted after the Complaint was made; and as well, the amendments to be discussed have not yet been proclaimed into force) they do reflect the current views of government and Ontario society in respect of the rights of the disabled. The Respondent Woods' conduct toward the Complainant reflects archaic notions about the disabled and their place in the world. The Ontario Code is at the vanguard of the new values of equality, in prohibiting by law harassment in employment because of handicap.

On December 18, 1986 the Equality Rights Statute Law Amendment Act S.O. 1986 c.64 ("Bill 7") received royal assent. This Act is designed to bring Ontario statute law into line with the values represented in the Canadian Charter of Rights and Freedoms, in particular, the equality provisions of section 15 of the Charter. The amendments touch upon a wide range of legislative instruments, two of which are relevant to our present inquiry, as they signal the current view of the government on the rights of the disabled.

Section 24 of the Employment Standards Act (R.S.O. 1980 c.137) has been repealed by this amending statute (s.14(1), S.O. 1986 c.64). This section had provided that the Director of Employment Standards could authorize the payment of wages below the minimum wage to disabled persons in designated workplaces. The so-called "sheltered workshops" established under this section, notwithstanding their achievements, have arguably contributed incidentally to unfortunate notions which surround disability and the role of the disabled in the community. An unintended aspect of these workshops is that they tend to manifest and perpetuate the archaic belief that the handicapped do not have a place in the mainstream of society. While they undoubtedly are intended in a good faith effort to provide needed 'gainful' employment, the state sanctioning of discrimination by allowing the payment of less than the minimum wage tends to entrench, through ghettoization, an 'apartness' of the disabled. In eliminating this antiquated institution, Ontario has moved yet another step closer to the goal of fully integrating the disabled in society.

Of more immediate concern are the amendments to the Act under which this Board was constituted, the Ontario Human Rights Code, 1981, S.O. 1981 c.53. These amendments explicitly embrace the doctrine of reasonable accommodation and undue hardship in cases of constructive discrimination. It had been assumed by many in the human rights field that these doctrines were implicit in the human rights codes in all Canadian jurisdictions. The

Supreme Court of Canada, however, in Simpsons-Sears v. O'Malley [1985] 2 S.C.R. 536, and Bhinder v. C.N.R [1985] 2 S.C.R. 561, placed these assumptions in some considerable doubt (those cases were not addressed by the Court in the light of the Charter) and so the clear statements in the amendments to sections 10 and 16 are to be welcomed. The amended section 10 reads:

> 10.(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> a) the requirement, qualification or factor is reasonable and bona fide in the circumstances, or,
>
> b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Commission, a board of inquiry, or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.(emphasis added)

The Code is amended further to remove the previously existing "access or amenities defence" seen in (now repealed)

paragraph 16(1)(a). It had been possible for a respondent to escape liability under the Code if it was demonstrated that the constructive discrimination was the result simply of structural or architectural barriers to the disabled. That provision was quite probably in conflict with the Canadian Charter of Rights and Freedoms, in that it violated the equality rights of section 15, yet was too broad a defence to meet the criteria of the "reasonable limits" exception afforded to governments by section 1 of the Charter. Under the new subsection 16(1) of the Code the only defence to discrimination because of handicap is that the "person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap", and there cannot be reasonable accommodation (or put otherwise there cannot be accommodation without undue hardship). The new subsection 16(1a) provides that,

> The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

It should be noted that in assessing undue hardship the Commission, board or court is to consider only cost, funding and health and safety requirements. When this amendment was originally presented in Committee, "business inconvenience" had been included as a factor to be considered in evaluating undue

hardship. The omission of this factor in the statutory provision as finally legislated suggests that while mere business inconvenience may occasionally present a 'hardship', it will not be considered in itself enough to excuse the duty to accommodate. Unless one or more of the factors of cost, outside sources of funding, and health and safety result in undue hardship upon the person bearing the duty to accommodate, mere business inconvenience shall not be a defence. Subsection 16(1b) provides that standards may be prescribed by the regulations "for assessing what is undue hardship".

These amendments are a further indicator of the commitment by government to including the disabled in the mainstream of society. The physical and like barriers in the world to equality of opportunity for those with disabilities will only stand to the extent they cannot be removed without imposing an undue burden upon the entity or person responsible for them.

4. Remedies.

Section 40 of the Code provides for remedies, and I have reviewed this provision at length in Cameron, supra at D/2196 - D/2201. In the instant situation there was an infringement of the Code "engaged in wilfully or recklessly" resulting in mental anguish within the meaning of paragraph 40(1) (b). The Complainant suffered more harm than was foreseeable by the Respondent Woods. The situation is similar to the "thin skulled" plaintiff problem seen in tort law. See Morley Rand and canadian

Union of Industrial employees v. Sealy Eastern Limited, Upholstery Division, (1982) 3 C.H.R.R. D/938 at D/954 - D/957 and particularly at para. 8506. The general limitations to liability do not limit the special case of very vulnerable victims, once the type of injury is foreseeable to the wrongdoer, as it was here.

As well, a separate component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. (Cameron, at D/2198, paragraph 18539).

In the instant situation, I think that an award of $3000.00 in general damages is appropriate. Given all the circumstances, there was a real substantive loss of dignity to Mr. Boehm, with significantly injured feelings, considerable emotional upset, and real psychological damage and mental anguish.

I have reviewed the law in respect of damages for lost wages in Rossana Torres v. Royalty Kitchenware Limited and Francesco Guercio (1982) 3 C.H.R.R. D/858, Morely Rand v. Sealy Eastern Limited (1982) 3 C.H.R.R. D/938 and Cameron, supra, D/2196, para. 18525 - D/2198, para. 18536). These cases were applied recently in Cuff v. Gypsy Restaurant (supra).

In the present case, the Commission argued that there had been a constructive dismissal. However, considering all the evidence, I do not think a finding of constructive dismissal should be made. Most certainly, Mr. Boehm should not have had to endure the continuing harassment of Mr. Woods. However, neither

Mr. Heagle nor Mr. Pettifer reasonably suspected a continuing problem after the visit of Dolph's mother and father after the pie incident. They had been told to contact Mr.Heagle if there were any further problems. I think it reasonable to have given senior management a further opportunity to resolve the problems, before terminating the employment. National had hired many disabled people, and the Complainant was a good and valued employee. Senior management had no reason to suspect continuing problems after the complaint about the pie-eating incident. Management wanted and requested Mr. Boehm to return to work after February 21, 1984. Although I have no doubt the Complainant subjectively felt there was no chance of redressing the situation with Mr. Woods, in my view senior management should have been given an opportunity to do so after receiving a further complaint. If they did not rectify the situation, then continuing harassment in the nature of Mr. Woods then vexatious course of conduct and comments toward Mr. Boehm would have amounted to constructive dismissal, if Mr. Boehm had then decided to leave the employment rather than endure such further abuse.

In the present case, Mr. Boehm's problems of February 21, 1984, were really the culmination of a series of incidents over a period of time with the pie eating situation, in particular, standing out. Mr. Boehm's emotional problems, which certainly prevented him from returning to work following his day off, were caused by the harassment of Mr. Woods. He could not return to work for some period of time. In my opinion, a reasonable period

for recuperation was two weeks. Although his physician was of the view he could not return at all, if the Complainant had met with Mr. Heagle and Mr. Pettifer I think he would have felt much better, constraints would have been put upon Mr. Woods' behaviour by National, and the Complainant's emotional state would have been such that he would have been able to return to work, which would have been far better for all concerned. Consistent with the principle of equality of treatment, the Complainant like any other complainant is under a duty to take the initiative with reasonable steps to mitigate his loss. His employment situation at National was not irretrievable, if everyone had sat down together. Having said that, I emphasize that the senior management of National, Mr. Heagle and Mr. Pettifer, could have been much more forceful in taking an initiative to see Mr. Boehm, comfort him, and ensure him that his grievances would be redressed.

In the circumstances, however, given the extreme emotional upset inflicted upon Mr. Boehm by Mr. Woods, I think that Mr. Boehm was entitled to be absent from work for two weeks, and to receive as compensation two weeks lost wages, being $340.00.

The further award of "interest" in respect of damage awards was made in Cameron, supra (at D/2201, paras. 18564, 18565). The commencement date for interest is the time of service of the complaint upon the respondents. The applicable interest rate is that established by the Bank of Canada for the month previous to the month in which service of a complaint was made. No evidence

at all was not given on either of these points, as it should have been. However, judicial notice can be taken of the fact that the Bank of Canada interest rate was certainly always above 7.5 percent over the time period in question. The Complaint would seem inferentially from the evidence to have been served by at least the end of 1984. Accordingly, interest of 7.5 per cent per annum should run from January 1, 1985 to the date of this award, being 800 days, on $3340.00 (general damages and lost wages). This amounts to about $549.00.

ORDER

This Board of Inquiry having found the Respondents, David Woods and National System of Baking, Limited, to be in breach of subsection 4(2) and section 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c.53, in respect of the Complainant, Dolph Boehm, for the reasons given, this Board of Inquiry orders that the Respondents are jointly and severally liable to pay forthwith to the Complainant, Dolph Boehm, as follows:

(1) as damages for lost wages, the sum of three hundred and forty ($340.00) dollars;

(2) as general damages, the sum of three thousand ($3000.00) dollars; and

(3) as interest in respect of such awards of damages in (a) and (b) the sum of five hundred and forty-nine ($549.00) dollars.

Dated at Toronto this 13th day of March, 1987.

Peter A. Cumming

Board of Inquiry